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No. _____

In The Supreme Court Of The United States

MARGARET A. BAGLEY, Warden,

Petitioner,

v.

JOHN W. BYRD, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Capital Case

QUESTIONS PRESENTED

I. Whether a state prisoner may file a second or successive habeas petition raising an actual-innocence-of-the-death-penalty claim when the prisoner has not complied with the "due diligence" requirement in 28 U.S.C. 2244(b)(2)(B).

II. Whether a circuit court of appeals, in reviewing a state prisoner's request for an order authorizing "the district court" to consider a second or successive habeas petition under 28 U.S.C. 2244(b)(3), may appoint a different district court judge or magistrate to make factual findings about the prisoner's new claims before the original district court judge on the case is given an opportunity to do so.

III. Whether, in light of the requirement in 28 U.S.C. 2244(b)(3)(B) that "a three-judge panel of the court of appeals" must decide any motions from state prisoners seeking permission to file a second or successive habeas petition, and in light of the ban on the filing of petitions for rehearing in 28 U.S.C. 2244(b)(3)(E), a circuit court of appeals may nonetheless (1) permit a state prisoner to file such a rehearing petition, (2) grant rehearing en banc "sua sponte," and (3) vacate a three-judge panel's opinion for the reasons described in the prisoner's rehearing petition.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of the Warden of the Mansfield Correctional Institution in Mansfield, Ohio, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The October 9, 2001 order of the court of appeals has been designated for publication, but has not yet been printed in the Federal Reporter. Pet. App. 1a-48a. The September 10, 2001 order of the court of appeals, as well as orders issued by the court of appeals the following day, have been

designated for publication, but have not yet been printed in the Federal Reporter. Pet. App. 49a-129a. The October 15, 2001 order of the chief district judge appointing a magistrate judge to conduct a factual hearing as directed by the court of appeals is unreported. Pet. App. 133a-134a.

JURISDICTION

The court of appeals issued its order on October 9, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(e).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 2244(b) states:

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

INTRODUCTION

This petition presents several important questions on which the judges of the en banc court of appeals are sharply divided. In recent weeks, the court of appeals has breathed new life into an actual-innocence-of-the-death-penalty claim, even though Ohio death-row inmate John Byrd intentionally

withheld that claim from both state and federal courts until after his first federal habeas petition – raising other issues – had been denied. Now he has presented his claim of innocence to the federal courts, and though the express language of the Antiterrorism and Effective Death Penalty Act of 1996 appears to bar Byrd from raising the claim at this late date – eighteen years after his trial, twelve years after securing an affidavit purporting to bolster his just-revealed claim of innocence, and seven years after filing his first federal habeas petition – the court of appeals has ordered a magistrate judge to examine the merits of the claim. Because the court of appeals has done so – and has done so in a most unusual way – we respectfully ask the Court to grant certiorari in this case.

AEDPA permits state prisoners to file second or successive habeas petitions raising facts not presented in a first petition, but only when "the factual predicate for the [new] claim could not have been discovered previously through the exercise of due diligence." 28 U.S.C. 2244(b)(2)(B)(i). That language appears to bar Byrd's "new" claim of innocence, because he sat on the "proof" that he now offers – the affidavit of a co-defendant – for twelve years. Even so, the en banc court of appeals has ordered fact-finding on the claim, and appears poised to grant Byrd's request to file a new habeas petition raising that claim of innocence.

The appellate court's decision not only runs counter to the express language of AEDPA, but it also is inconsistent with this Court's longstanding view that prisoners should present their habeas claims – even claims of actual innocence – at the first available opportunity. The en banc court's action in this case may very well "give litigants incentives to withhold claims for manipulative purposes and may establish

disincentives to present claims when evidence is fresh." *McCleskey v. Zant*, 499 U.S. 467, 491-92 (1991).

And the en banc court of appeals has acted over the spirited dissents of some of its more senior members, and has done so in a most unusual way: by granting rehearing even though petitions for rehearing are not permitted in these circumstances. To top it off, the court of appeals has assigned the case, at least temporarily, to a new judge, evidently cutting out of the picture the district court judge who denied Byrd's first federal habeas petition. The court of appeals, in any number of ways, has departed from the path marked out for it by this Court and by Congress in habeas cases, and the Court should now grant certiorari to settle issues that have split the court of appeals and have sent this habeas case off in new and uncharted directions.

STATEMENT

Respondent John W. Byrd, Jr., is an Ohio prison inmate who was convicted and sentenced to death by an Ohio trial court in 1983. Byrd filed his first federal habeas petition in 1994. U.S. District Judge James Graham denied the petition two years later, and the court of appeals affirmed that judgment last year. *Byrd v. Collins*, 209 F.3d 486 (6th Cir. 2000), *cert. denied*, 531 U.S. 1082 (2001).

Earlier this year, Byrd claimed for the first time that he was "innocent of the death penalty" under Ohio law, and offered the affidavit of a co-defendant to support his claim. Byrd acknowledges that he obtained the affidavit twelve years ago, and that he deliberately withheld it from both Ohio's state courts during state post-conviction proceedings and from the federal courts while his first federal habeas petition was pending. He presented the affidavit and his new claim of innocence to Ohio's courts several months ago, but

the state trial and appellate courts declined to grant any relief to Byrd, concluding that his new evidence "lack[s] any credibility whatsoever," and is not new in any event. *State v. Byrd*, 2001 Ohio App. LEXIS 3655, *26 (Ohio App., 1st Dist. 2001), *appeal not allowed*, 753 N.E.2d 863 (Ohio 2001). The state supreme court set September 12, 2001 as Byrd's execution date.

Byrd turned next to the court of appeals, asking the court in early September to decide whether he could file a second federal habeas petition in the district court. The court of appeals concluded on September 10, 2001 that Byrd's "attempt at filing a second habeas petition is clearly governed by the AEDPA," Pet. App. 55a n.3, and found that the relevant provision of the Antiterrorism and Effective Death Penalty Act of 1996 barred Byrd's effort to file a new petition, because his claim did not turn on "a new rule of constitutional law . . . that was previously unavailable," and was not one that Byrd "could not have . . . discovered previously through the exercise of due diligence." 28 U.S.C. 2244(b).

According to the court of appeals, "Byrd could have raised his actual innocence claim in his first, pre-AEDPA federal habeas petition," Pet App. 66a, and because he "deliberately withheld his actual innocence claim" from that petition, Pet. App. 67a, he "cannot satisfy [28 U.S.C.] § 2244(b)'s requirements." Pet. App. 56a.

The court of appeals also addressed Byrd's argument that AEDPA's restrictions on the filing of second petitions should not apply to him. He argued that pre-AEDPA doctrines announced by this Court would have permitted him to file a second federal habeas petition even though he withheld his evidence of innocence during the first federal habeas process, and so he urged the court of appeals to apply

that pre-AEDPA approach to his case. In response, the court of appeals described Byrd's withholding of his evidence of innocence as "the quintessential abuse of the writ" and "nothing short of fraud on th[e] Court." Pet. App. 67a, 69a. Byrd, according to the court of appeals, would not in fact have been permitted to raise his claim of innocence in a second petition even under more lenient pre-AEDPA standards, both because he could not show any cause that might have excused his failure to present his innocence claim sooner, Pet. App. 67a-69a, and because he likewise could not satisfy the "fundamental miscarriage of justice" exception for truly innocent prisoners who have defaulted their federal claims. Pet. App. 69a-76a.

Though the court of appeals concluded that both AEDPA and its predecessor doctrines barred Byrd from filing a second habeas petition, the court granted Byrd a temporary stay of execution for eight more days, until September 18, 2001. Pet. App. 77a.

Judge Batchelder concurred in Judge Suhrheinrich's opinion for the court on the merits of Byrd's claims, agreeing that "AEDPA does apply to Byrd's attempt to obtain habeas relief, and . . . Byrd cannot satisfy the requirements imposed by the AEDPA on the filing of a successive habeas petition." Pet. App. 79a. Judge Batchelder dissented, however, from the portion of the opinion granting an eight-day stay of execution.

Judge Jones filed a brief dissent, citing the "complexity of the issues" in Byrd's request, and adding that the case "squarely implicates a question of fundamental fairness," making a stay of execution "imperative." Pet. App. 79a.

State officials asked this Court to lift the stay in light of the appellate court's ruling on the merits of Byrd's claim, but the Court denied the State's application to vacate the stay on September 12, 2001. Pet. App. 130a.

Meanwhile, Judge Boggs asked the en banc court of appeals to consider vacating the eight-day stay, suggesting that the court's order denying Byrd's request for permission to file a second petition deprived the court of appeals of any "jurisdictional basis" for granting the stay. Pet. App. 80a-81a.

The day after Judge Boggs made his request, the en banc court declined to vacate the stay, and in fact extended it to October 8, 2001. Pet. App. 82a. That two-paragraph order, which also directed the clerk of the court "to file and submit to the court any petition offered by a party seeking en banc review of the decision of the panel" prompted several members of the court to file a series of concurring and dissenting opinions over the next several days.

Judge Jones, joined by Judge Cole, concurred in the order extending the stay of execution to October 8th, explaining the voting procedure that had led to the extension. Pet. App. 86a-89a.

Judge Boggs dissented, arguing that if AEDPA controls Byrd's case, as the court had found, then AEDPA bars the filing of a petition for rehearing, and so a stay was inappropriate. He described the court's action as "lawless," and suggested that "apparently . . . death-sentenced prisoners . . . could file a hot dog menu, and the en banc court might use that as a legal basis" for extending a stay. Pet. App. 85a.

Judge Boggs also filed a separate dissent, joined by Judges Suhrheinrich and Batchelder, attacking the voting

procedure that led to the extended stay. Judge Boggs claimed that "secret undocumented decision-making by exclusive in-groups" had led to the stay extension, and he compared that procedure to "the way decisions are made in totalitarian countries." Pet. App. 92a. Judge Suhrheinrich wrote a dissent as well, decrying the lack of "any formal written confirmation or identification of who voted" to extend the stay. Pet. App. 97a. And Judge Batchelder, joined by Judge Siler, dissented also, explaining that she had not been consulted and had not been given an opportunity to vote before the court extended the stay from September 18th to October 8th, and criticizing the absence of any written vote or any "record of the cabal that resulted in this stay." Pet. App. 98a.

Meanwhile, the original three-judge panel that had denied Byrd's request to file a second petition but had nonetheless granted an eight-day stay of execution on September 10, 2001, reissued its full opinion on September 11th with the stay language removed. Pet. App. 99a-129a. That change in Judge Suhrheinrich's original opinion for the court prompted Judge Batchelder to file a separate concurrence joining the opinion in full. She added that "there is no legal basis whatsoever for the stay of execution purportedly granted by a majority of the en banc court." Pet. App. 128a.

Judge Jones again dissented from the court's September 11th opinion as he had from the nearly-identical opinion of the day before, insisting that the "court must carefully explore whether Byrd can satisfy the legal standard that would entitle him to file a second habeas petition." Pet. App. 129a.

Consistent with the en banc court's September 11th order directing the clerk to "file and submit to the court any

petition offered by a party seeking en banc review of the decision of the panel," Pet. App. 82a, Byrd filed a petition for rehearing in the court of appeals the next day, and he also asked the court of appeals to appoint a special master to review his claim of innocence.

On October 9, 2001, the en banc court of appeals, in an unsigned order, then directed the chief district judge for the Southern District of Ohio to appoint a U.S. magistrate judge of his choosing to "promptly conduct an appropriate factual hearing," and to "develop a record with regard to John Byrd's claim of innocence." Pet. App. 1a-2a. The order indicated that a majority of the full court's active judges had "voted that the court remand this matter for the development of a factual record sufficient to permit *sua sponte* consideration of a request for leave to file a second petition for a writ of habeas corpus." Pet. App. 1a. Though the order does not expressly so state, the en banc court has evidently vacated the original three-judge opinion of the court that denied Byrd's request to file a second federal habeas petition.

The October 9th order also specified the witnesses and documents that the hearing should address, and ordered the to-be-appointed magistrate judge to "submit[] a report with factual findings and recommendations to the en banc court within 45 days from the date of the appointment of the Magistrate Judge." Pet. App. 2a-3a. In addition, the order indicated that the stay of execution would remain in place pending further order from the court of appeals.

Judge Jones, joined by Judges Daughtrey, Cole and Clay, concurred in the "remand" order. He noted that "[t]here is no disagreement on the court that Petitioner Byrd does not satisfy the statutory filing requirements of the AEDPA," but he explained that a majority of the court's

active judges "have agreed that the court is without an adequate factual record to determine whether a second filing is warranted under the miscarriage of justice exception." Pet. App. 5a-6a. The concurring opinion adds that Byrd's "evidence of actual innocence . . . likely warrants a second habeas action," and faults Ohio's state courts for failing to conduct an evidentiary hearing on that evidence. Pet. App. 6a. According to Judge Jones, his colleagues on the original three-judge panel had "wrongly refused Byrd's request for authorization to file a second habeas petition." Pet. App. 7a.

Noting that 28 U.S.C. 2244(b)(3)(E) bars the filing of a rehearing petition in cases like this – the "grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari" – the concurring opinion explains that "AEDPA did not alter the authority of the *en banc* court to order a rehearing on its own motion." Pet. App. 7a.

Judge Cole also concurred in the October 9th order, and he was joined by Judges Jones, Daughtrey, Moore and Clay. He focused on the "en banc court's authority to vacate *sua sponte* the decision of a three-judge panel," and though he acknowledged that 28 U.S.C. 2244(b)(3)(E) "clearly prohibits a petitioner from requesting rehearing, nothing in its text bars a federal appellate court from rehearing a matter en banc upon its own motion." Pet. App. 13a-14a. Judge Cole's concurring opinion adds that "we are vacating the decision of the three-judge panel." Pet. App. 14a n.1.

Judge Boggs, joined by Judges Suhrheinrich and Batchelder, dissented. He noted that Byrd had filed a petition for rehearing en banc, which Judge Boggs said is "clearly not permitted." Pet. App. 20a. In Judge Boggs's view, Byrd, "with the approval of this court, has concocted a procedure

unknown to the law, where this court takes control of matters not properly before it, 'remands' them to a court where they have never been, and commands that the matters then be returned to this court, in 45 days or so, for this court, only then, to consider whether permission to file a second habeas should be granted by the full court." Pet. App. 22a.

According to Judge Boggs, "we are simply not authorized to do anything with a motion to file a second or successive petition other than to grant it, or deny it. We cannot shirk that duty or turn it over to others to conduct 'fact-finding' that we will apparently deal with in some capacity other than that assigned to us by our jurisdictional statutes." Pet. App. 23a. And he added that the court's "actions are lawless," and "[t]his activity has spun so far out of the authorized sequence that it may even be doubted whether the Supreme Court may be thought to have jurisdiction to stay it at this point." Pet. App. 23a.

Judge Suhrheinrich, joined by Judge Batchelder, dissented as well, and he too described the court's actions as "lawless" and "without legal support." Pet. App. 24a. He faulted the en banc court for sending the case "not to the United States District Judge to whom Byrd's first federal habeas petition was assigned, but to an appointed Magistrate Judge (presumably one who will do the bidding of the En Banc Court) who is yet to be named." Pet. App. 26a. He questioned "what procedure or rule of law allows the En Banc Court to interfere with the blind draw assignment of the United States District Judge to whom it was assigned," and noted that the district judge on the case "has handled this matter since 1994." Pet. App. 26a-27a, 27a n.2.

Consistent with the en banc court's October 9th order, Chief District Judge Rice has appointed a U.S. magistrate judge to conduct a factual hearing on Byrd's claim of

innocence. Pet. App. 133a-134a. Judge Merz – the appointed magistrate – has expressed uncertainty about the scope of his responsibilities, noting in an October 22, 2001 scheduling order that "[n]o clear line is drawn by the Court of Appeals between matters within the scope of the factual inquiry and those outside. There are of course no published rules which govern this sort of proceeding because it is unique." And Judge Merz told the parties at their initial meeting with him on October 18, 2001 that "I think it highly likely a majority of the United States Supreme Court is going to have to decide this anyway."

REASONS FOR GRANTING THE PETITION

The Court should review the order of the en banc court of appeals for three reasons. First, the decision permitting Byrd to raise his claim of innocence despite his failure to comply with AEDPA's "due diligence" requirement frustrates not only the will of Congress, but also undermines this Court's past insistence that federal habeas rules and practices should encourage, not discourage, the timely presentation of constitutional claims.

Second, the en banc court's decision to shift fact-finding responsibilities away from the district court judge who has handled this prisoner's case in the past likewise seems inconsistent both with the text of AEDPA and with the longstanding practice followed by this and other courts of appeals in habeas cases.

And finally, the en banc court's grant of rehearing despite the statutory ban on the filing of rehearing petitions in cases like this raises serious questions about the validity of the fact-finding process that the court's order has set in motion.

I. Neither AEDPA Nor This Court's Precedents Suggest That A State Prisoner Who Has Intentionally Withheld An Actual-Innocence Claim From His First Federal Habeas Petition May Raise That Claim Later In A Second Petition.

Though Congress demands "due diligence" from state prisoners who try to raise new facts in a second or successive federal habeas petition, and though the prisoner in this case admits that he was anything but diligent in presenting his new claim of innocence to the federal courts, the court of appeals has welcomed Byrd's late-in-the-day effort to raise his actual-innocence-of-the-death-penalty claim in a second petition. Does an actual-innocence claim stand outside the normal rules for raising new claims in a second federal habeas petition, and can a prisoner raise such a claim in a second petition even when he has intentionally withheld the claim from his first petition? This case presents a sound vehicle for resolving this issue that has so sharply divided the judges on the en banc court of appeals.

That AEDPA applies in cases like this – where the state prisoner filed his first federal habeas petition before AEDPA's 1996 effective date, but now seeks to file a second petition – seems settled, for the Court has repeatedly applied AEDPA's restrictions to any new petitions filed or claims raised after that law's effective date. See, e.g., *Tyler v. Cain*, 121 S. Ct. 2478, 2481-82 (2001); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 642 (1998); *Felker v. Turpin*, 518 U.S. 651, 657, 664 (1996). In none of those cases has the Court suggested that the circuit courts must apply pre-AEDPA principles when reviewing an AEDPA-era second petition.

Yet, the apparent willingness of the en banc court of appeals to let Byrd raise his long-hidden claim of innocence

ignores AEDPA's "due diligence" requirement in 28 U.S.C. 2244(b)(2)(B). Only by treating actual-innocence claims differently and by holding that the statutory due diligence requirement simply does not apply to cases involving actual-innocence claims can the court of appeals do anything other than deny outright Byrd's request to file a second petition now. The en banc court's order directing new fact-finding on Byrd's claim suggests that a prisoner who claims innocence can sit on that claim indefinitely despite AEDPA's contrary language. That approach runs counter to this Court's unanimous view that Congress, by enacting AEDPA, has "eliminat[ed] a freestanding 'miscarriage of justice' exception," and is inconsistent with the Court's conclusion that AEDPA has "raised the bar . . . on prisoners who were not diligent in state-court proceedings." *Williams v. Taylor*, 529 U.S. 420, 433 (2000).

No one doubts that a state prisoner is entitled to raise in a second habeas petition a claim that he is innocent, and he of course may support that claim with any facts that "could not have been discovered previously through the exercise of due diligence." 28 U.S.C. 2244(b)(2)(B)(i). But where the prisoner has intentionally hidden his claim of innocence from both state and federal courts for more than a decade, may he nonetheless secure last-minute federal-court review of the claim just because it falls in the special category of "actual innocence"? If he can, then every death-row prisoner will of course do exactly what this prisoner has done: save an actual-innocence-of-the-death-penalty claim until all other appeals are exhausted, and then spring the claim on the federal courts, triggering a new round of perhaps years-long review of the "new" claim.

Certainly nothing in AEDPA points to any intent on the part of Congress to create that kind of reverse due diligence incentive in the actual-innocence context, and at

least one circuit court of appeals has rejected the approach followed by the en banc court in this case. See *Roberts v. Bowersox*, 170 F.3d 815, 816 (8th Cir. 1999) (denying prisoner's request to raise an actual-innocence claim in a second or successive habeas petition where the prisoner could not show that he "could not have discovered the factual basis for the claim before through the exercise of due diligence"). This Court's pre-AEDPA cases likewise provide no support for the view that prisoners should be rewarded for hiding their constitutional claims for as long as they can. See, e.g., *Gomez v. United States Dist. Court*, 503 U.S. 653 (1992) (per curiam) (vacating a stay of execution where the prisoner's claim "could have been brought more than a decade ago" and the prisoner offered "no good reason for this abusive delay"); *McCleskey*, 499 U.S. at 498 (explaining that prisoners "must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition").

Though the "significant limits on the discretion of federal courts to grant habeas relief" are designed to reflect the Court's "enduring respect for the State's interest in the finality of convictions that have survived direct review within the state court system," *Calderon v. Thompson*, 523 U.S. 538, 554-55 (1998), the order of the court of appeals in this case sends a much different message. The court of appeals has created a set of incentives that will encourage death-row prisoners to raise claims of innocence in last-minute second petitions rather than when those claims and the facts supporting them are first discovered, and that approach reflects the type of "disrespect for the finality of convictions" that is so disruptive to "the entire criminal justice system." *McCleskey*, 499 U.S. at 492.

By allowing Byrd to raise now in the federal courts a twelve-year-old actual-innocence claim that Byrd himself

chose to omit from his first federal habeas petition in 1994, the en banc court of appeals has endorsed an approach that is supported neither by the language of AEDPA nor by any prior decision of this Court. The issue is an important one in capital cases, and it merits review now.

II. The Court Of Appeals Has Improperly Ordered Fact-Finding By A Magistrate Judge.

The en banc court's order "remanding" this case to the chief district judge, who in turn has appointed a magistrate judge to the case, sidesteps the standard practice in federal habeas cases, for neither the chief district judge nor the assigned magistrate judge have had any previous dealings with Byrd's case. Though the court of appeals has called for trial-court fact-finding on Byrd's claim of innocence, the court's order appears to cut out from that fact-finding process the very district court judge who, from 1994 until 1996, reviewed and rejected Byrd's first federal habeas petition. The en banc court's order, whether intentionally or not, sends a message to the parties and to the lower court that the court of appeals can and will take habeas cases away from one trial judge and reassign them to another judge of the court's choosing. That troubling practice – one taken in a case that has generated such open and sharp debate among the judges on the court of appeals – warrants review here.

Whatever the merits of the en banc court's decision to let Byrd pursue his "new" claim of innocence now, any review of that claim ought to be handled in a way that all parties and the public will view as fair. In a case like this, in which dissenting members of the court of appeals have used such strong language in questioning the court's authority to proceed as it has, that appearance of impartiality and fairness is all the more important. The en banc court's action has

called that sense of fairness into doubt for the dissenters, and perhaps, regrettably, for the public as well.

AEDPA refers twice to "the district court" in describing the gate-keeping function that appellate courts are to play when a state prisoner requests permission to present a second or successive habeas petition to the district court. See 28 U.S.C. 2244(b)(3)(A) and (B). That language, like pre-AEDPA practice, has long dictated that any second or successive petition filed by a state prisoner be reviewed and decided by the same district court judge who acted on the prisoner's first habeas petition.

Local court rules governing capital cases in the Southern District of Ohio conform to that practice. See Crim. Rule 57.2(h) of the Loc. Rules of the U.S. Dist. Court ("If the same petitioner has previously filed in this Court an application . . . for habeas corpus relief, the case shall be allotted to the judge who considered the prior matter."). Much like the Sixth Circuit's own Internal Operating Procedure 22(a)(1) that directs the original panel on any capital case to likewise address any second or successive petitions filed by the same prisoner, the district court's local rule sensibly removes any party-driven or judge-driven forum-shopping in capital cases. The en banc court's contrary approach in this case undercuts the local rule's laudable goal.

To be sure, the court of appeals may yet plan to return this case to District Judge Graham if the court of appeals grants Byrd's request to file a second habeas petition. Yet by the time that happens, the newly-assigned magistrate judge presumably will have heard the testimony and made the factual findings that the court of appeals has requested, leaving the original district judge's hands tied to a great extent. Though "the district court is afforded a degree of

discretion in determining whether to hold an evidentiary hearing" in habeas cases, *Lonchar v. Thomas*, 517 U.S. 314, 326 (1996), and though "a determination of a factual issue made by a State court shall be presumed to be correct," 28 U.S.C. 2254(e)(1), any second habeas petition that might eventually land in the lap of the original district court judge will arrive there only after the court of appeals (1) has ordered that an evidentiary hearing be held, (2) has faulted the fact-finding process employed by Ohio's own courts, (3) has directed a hand-picked magistrate judge to issue factual findings about the issues in Byrd's second habeas petition, (4) has reviewed the factual findings and recommendations of the assigned magistrate judge, and (5) has, in light of those findings on Byrd's claim of innocence, ordered that Byrd be permitted to file his second petition raising that claim in the district court.

In short, the fact-finding process ordered by the court of appeals strips from the original district court judge much of the discretion that he might otherwise enjoy in his review of a second petition. The en banc court's order trimming that discretion for this one judge – a judge who has already ruled against Byrd on his first petition – carries with it the unpleasant taint of unfairness that simple adherence to standard judge-selection rules in capital habeas cases can eliminate. AEDPA's references to "the district court" in 28 U.S.C. 2244(b)(3)(A) and (B) suggest that Congress intended any review of second or successive petitions to be handled by the original district court judge on the case, and the en banc court's contrary approach deserves review.

III. The Grant Of Rehearing En Banc In This Case Conflicts With AEDPA's Requirement That "A Three Judge Panel" Should Hear Any Requests By State Prisoners For Permission To File Second Or Successive Habeas Petitions, And That Order Likewise Runs Counter To AEDPA's Ban On The Filing Of Rehearing Petitions.

The en banc court's order is unusual in yet another way, for the court of appeals voted "sua sponte" to rehear Byrd's case after the original three-judge panel denied Byrd's request for permission to file his second federal habeas petition. Though 28 U.S.C. 2244(b)(3)(B) calls for "a three-judge panel of the court of appeals" to decide any such request, and though 28 U.S.C. 2244(b)(3)(E) bars the filing of a petition for rehearing after a panel of the court of appeals has granted or denied a prisoner's request for authorization to file a second petition, the en banc court expressly directed the clerk of the court to accept and file any such rehearing petition in this case. Then after Byrd in fact filed a rehearing petition the next day, and after the court of appeals called for and accepted for filing a response to that petition, the en banc court granted Byrd's request for rehearing (though the court disclaimed any connection between Byrd's rehearing petition and the court's "sua sponte" action).

Yet again, the en banc court's action seems driven more by a seeming interest in reaching a particular outcome for this and perhaps other death-row inmates than by the limits of AEDPA's text. As the concurring opinions on the en banc court rightly note, Congress has banned "petition[s] for rehearing" rather than rehearing itself in cases like this, but the court of appeals has surely skated at least right up to the line by directing the clerk to accept a petition for rehearing in Byrd's case, by in fact letting Byrd file such a

petition, and then by granting rehearing en banc for the reasons that Byrd explained.

Much as in *Calderon v. Thompson*, 523 U.S. 538 (1998), where the Court questioned the en banc Ninth Circuit's "sua sponte" recall of its mandate in a capital case, this case raises questions about the en banc Sixth Circuit's compliance with AEDPA's limits on second or successive habeas petition. In *Calderon*, the Court explained that "[i]f, in recalling the mandate, the court considers new claims or evidence presented in a successive application for habeas relief, it is proper to regard the court's action as based on that application . . . irrespective of whether the court characterizes the action as sua sponte." 523 U.S. at 554.

So here, though the en banc court dubbed its action "sua sponte," the court granted the very relief that Byrd requested in his rehearing petition. In fact, the court's order directing the appointment of a new magistrate judge to the case echoes Byrd's separate request that the en banc court not only grant rehearing but also appoint a special master to conduct fact-finding on his claim of innocence, though again, the court purports to have acted on its own, and never mentions in its order Byrd's request that a new fact-finder hear his "new" claim of innocence.

In barring rehearing petitions on prisoners' requests for permission to file second or successive habeas petitions, Congress surely sought to stop the very legal battles that have played out in the court of appeals since a three-judge panel denied Byrd's request for permission to file a second habeas petition in September. The intent of 28 U.S.C. 2244(b)(3)(E) was to cut off extended review of those panel decisions by the full courts of appeals or by this Court, for as the legislative history of that provision indicates, "[s]uccessive petitions must be approved by a panel of the court of

appeals." H. Conf. Rep. No. 104-518, 104th Cong. 2d Sess. 111 (1996), reprinted in 1996 U.S.C.C.A.N. 924, 944.

As 28 U.S.C. 2244(b)(3)(B) directs, "a three-judge panel of the court of appeals" issued a decision on Byrd's request for permission to file a second or successive petition, and once that panel denied Byrd's request to file such a petition, the matter should have ended there.

Whether the en banc court is right in its view that the circuit courts of appeals retain the power to grant rehearing in cases like this despite the ban on "petition[s] for rehearing" in 28 U.S.C. 2244(b)(3)(E), the court's express directive that the clerk accept and file any such petition in this case is troubling. And given AEDPA's explicit reference to "a three-judge panel of the court of appeals" in this context, and given that the court's "sua sponte" grant of rehearing en banc turned on the very arguments raised in the rehearing petition that Byrd in fact did file, the legal underpinnings for the extensive fact-finding process spelled out in the en banc court's October 9th rehearing order seem shaky at best. Coupled with the other issues raised in this petition, this additional question warrants the Court's attention now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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